Talasco Insurance Bhd (formerly known as Talasco Insurance Sdn Bhd) v Goh Thiam Hock

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12–22 OF 1998
SURIYADI J
30 OCTOBER 1998

Civil Procedure *— Judgment — Default of appearance — Appeal against decision of sessions court judge dismissing setting aside application — Whether defendant had no notice of proceedings — Whether defendant entitled to actual notice or not — Road Transport Act 1987 s 96(2)(a)*

As a result of an accident, the plaintiff/respondent filed an action, registered as Summons No 73–19–94, against one Zakaria bin Ithnin, owner/driver of a motor van registered as JCD 6150. A default judgment was obtained against Zakaria and he was ordered to pay a considerable sum as damages to the plaintiff. Prior to court proceedings, the plaintiff had undertaken every possible step to identify the insurer. It was only after judgment was obtained against Zakaria, was it discovered that Talasco Insurance Sdn Bhd ('the defendant/appellant') was the relevant insurer at the time of the accident. The plaintiff then filed an action against the defendant. In that action, the plaintiff claimed that the defendant was required to indemnify and pay the adjudged sum to him by virtue of s 96(1) of the Road Transport Act 1987 ('the Act'). The defendant did not appear despite having been served with a summons which resulted in a default judgment being entered against it. Subsequent to this, the defendant filed an application to set aside the default judgment but was dismissed. The defendant then appealed. Issues for the court to determine in the appeal included the defendant's claim that the default judgment obtained in Summons No 73–19–94 was unenforceable against itself as it had no notice of proceedings and whether the defendant should be entitled to actual notice or not.

Held, dismissing the appeal:

(1) As to the issue of evidential burden, the law is clear in that it lies on the aggrieved party, with the level of proof not exceeding that of a civil case. If the court is convinced on a balance of probability that the defendant had notice of the proceedings, then that will suffice. Actual service is merely evidential in its effect. The evidence convinced the court that the plaintiff had done more than ample to ensure that the defendant had notice of the proceedings, in spite of the insurmountable obstacles that prevailed (see p 187F–G).

(2) So long it is sufficiently clear in the mind of the insurer that a legal proceeding is impending, such a notice need not necessarily be documentary in form. No doubt something that is so informal like a casual conversation will not suffice. In as much as by inference that a written notice may probably be the wisest way to give notice

to the insurance company of the proceedings, in a case where the defendant had refused to come foward to assume responsibility, suffice if it had notice through a third party (see pp 186I dan 187A–B).

[Bahasa Malaysia summary

Hasil daripada berlakunya sebuah kemalangan, plaintif/penentang telah memfailkan satu tindakan, didaftarkan sebagai Saman No 73–19–94, terhadap Zakaria bin Ithnin, pemilik/pemandu sebuah motor van yang didaftarkan sebagai JCD 6150. Satu penghakiman ingkar telah telah diperolehi terhadap Zakaria dan dia telah diperintahkan untuk membayar sejumlah wang sebagai ganti rugi kepada plaintif. Sebelum prosiding-prosiding mahkamah, plaintif telah mengambil setiap langkah yang mungkin untuk mengenalpasti syarikat insurans. Tetapi, hanya selepas penghakiman telah diperolehi terhadap Zakaria barulah diketahui bahawa Talasco Insurans Sdn Bhd (defendan/perayu) adalah syarikat insurans yang berkenaan pada masa kemalangan berlaku. Plaintif kemudiannya memfailkan satu tindakan terhadap defendan. Di dalam tindakan itu, plaintif telah menyatakan bahawa defendan adalah dikehendaki untuk menanggung rugi dan membayar jumlah yang telah diputuskan itu kepadanya menurut s 96 Akta Pengangkutan Jalan 1987. Defendan tidak hadir walaupun telah diberikan saman dan ini telah menyebabkan satu penghakiman ingkar telah diperolehi terhadapnya. Berikutan daripada itu, defendan telah memfailkan satu permohonan untuk mengetepikan penghakiman ingkar itu tetapi telah ditolak dengan kos. Defendan kemudiannya membuat rayuan. Isu-isu untuk diputuskan oleh mahkamah di dalam rayuan tersebut termasuklah tuntutan defendan yang mengatakan penghakiman ingkar yang diperolehi di dalam Saman No 73–19–94 tidak boleh dikuatkuasakan terhadapnya kerana ia tidak mempunyai notis mengenai prosiding-prosiding dan sama ada defendant berhak kepada notice yang sebenarnya atau tidak.

Diputuskan, menolak rayuan:

(1) Untuk isu beban 'evidential', undang-undang adalah jelas di mana ia terletak ke atas pihak yang terkilan, dengan tahap pembuktian yang tidak melebihi tahap bagi sesuatu kes sivil. Jika mahkamah yakin atas imbangan kebarangkalian bahawa defendan mempunyai notis terhadap prosiding-prosiding tersebut, maka itu adalah mencukupi. Penyampaiyan yang sebenarnya adalah semata-mata mempunyai kesan 'evidential'. Keterangan-keterangan telah meyakinkan mahkamah bahawa plaintif telah melakukan lebih daripada cukup bagi memastikan defendan mempunyai notis terhadap prosiding-prosiding, walaupun terdapat banyak halangan (lihat ms 187F–G).

(2) Asalkan ia adalah cukup jelas di dalam pemikiran syarikat insurans bahawa satu prosiding undang-undang akan dibawa

terhadapnya, sesuatu notis itu tidak perlu di dalam bentuk dokumen. Adalah tidak dipertikaikan sesuatu yang sungguh tidak formal seperti satu perbualan biasa adalah tidak mencukupi. Walaupun secara inferens satu notis bertulis mungkin menjadi jalan yang paling bijak untuk memberi notis kepada syarikat insurans tentang prosiding-prosiding berkenaan, di dalam kes di mana defendan telah enggan tampil ke hadapan untuk bertanggungjawab, cukup jika ia mendapat notis melalui pihak ketiga (lihat ms 186I dan 187A–B).]

Notes

For cases on judgment in default of appearance, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2534–2569.

Cases referred to

An Arbitration Between Coleman's Depositories Ltd and the Life and Health Assurance Association [1907] 2 KB 798 (refd)
China Insurance Co Ltd v Ng Siak Yow & Ors [1963] MLJ 244 (refd)
Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd [1997] 2 MLJ 829 (refd)
Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors [1997] 4 MLJ 329 (refd)
Friedlander, Re, ex p Oastler (1884) 13 QBD 471 (refd)
Herbert v Railway Passengers Assurance Co [1938] 1 All ER (refd)
Lickiss v Milestone Motor Policies at Lloyds [1966] 2 All ER 972 (refd)
Lim Yoke Kong v Sivapiran a/l Sabapathy [1992] 2 MLJ 571 (refd)
R v Shurmer (1886) 17 QBD 323 (refd)
Walker, Re, ex p Nickoll (1884) 13 QBD 469 (refd)
Webster v General Accident Fire and Life Assurance Corp Ltd [1953] 1 QB 520 (refd)

Legislation referred to

Evidence Act 1950 s 144(e), (f)
National Land Code 1965 s 431
Road Transport Act 1987 ss 58, 90, 95, 96(1), (2)(a), 97, 104
Road Traffic Ordinance 1948 s 80(2)
Rules of the High Court 1980
Subordinate Courts Rules 1980 O 28 r 8

Appeal from: Summons No 52–234–97 (Sessions Court, Melaka)

Razlan Hadri (*Gan Ho & Razlan Hadri*) for the appellant.
Lai Kuan Jean (*Taye & Co*) for the respondent.

Suriyadi J: An accident occurred on 4 April 1992 between the plaintiff and one Zakaria bin Ithnin who was the owner/driver of a motor van, registered

as JCD 6105. On 7 February 1994, the plaintiff filed an action against Zakaria at the magistrate's court. The action was filed as Summons No 73–19–94. A default judgment was obtained whereby Zakaria bin Ithnin was to pay the plaintiff RM22,000 as general damages, together with interest at 8% pa, from 27 December 1994 until realization. He was also ordered to pay special damages of RM1,778 and costs of RM3,229.

Prior to the court's proceedings which resulted in that judgment, the plaintiff had undertaken every possible step to identify the insurer, but to no avail. Only after judgment was obtained against Zakaria was it discovered that Talasco Insurance Sdn Bhd was the relevant insurer at the time of the accident. With that information and armed with the magistrate's court's order, the plaintiff filed an action against that insurance company ('the defendant') at the sessions court. It was registered as Sessions Court Summons No 52–234–97. The statement of claim before the sessions court judge, inter alia, claimed that pursuant to s 96(1) of the Road Transport Act 1987 ('the Act'), Talasco Insurance Sdn Bhd was required to indemnify and pay the adjudged sum to the plaintiff. On the hearing date of 14 November 1997, the defendant again showed indifference when it did not appear, in spite of having been served with a summons resulting in a judgment in default being entered against it. It was only after that default judgment was served on it that it began to view the matter seriously. The defendant filed an application vide a notis permohonan (RR8) before the same court to have the default judgment set aside, pursuant to O 28 r 8 of the Subordinate Courts Rules 1980.

Much to the defendant's chagrin, the application did not get the sympathy of the court, and was dismissed with costs. It subsequently filed an appeal, and the matter was heard on 30 October 1998.

Having heard the submissions of both parties, the main issues that were required to be resolved were whether:

(1) from the evidence adduced, there were sufficient grounds for me to allow the appeal and to set aside the default judgment of Summons No 52–234–1997;

(2) in the event I find that the insurer had no notice of the proceedings of Summons No 73–19–94, before or within seven days after that proceeding, what would be the contagion effect;

(3) pursuant to s 96(2)(a) of the Road Transport Act 1987, it could be interpreted that the varied acts and countless steps undertaken by the plaintiff were sufficient enough to permit the court to construe that the insurer had notice of the proceedings; and

(4) if not, does it mean actual notice is mandatory, in that there must be actual service of the notice on the defendant.

Before deliberating on the appeal, I had to consciously remind myself that this was an appeal emanating from a setting aside application for the default judgment of 52–234–1997, and not of 73–19–1994. In spite of this awareness, I was placed in a rather awkward position as the defendant had invoked the protection of s 96(2)(a) of the Road Transport Act 1987. In

A gist, the defendant claimed that the default judgment obtained in 73–19–1994 was unenforceable against itself as it had no notice of the proceedings. In the event the court accepts that assertion, then the default judgment was in jeopardy. Regardless of the outcome to the defendant, that order as against Zakaria remains unscathed and thus remained good as against him. It therefore follows that if the judgment of 73–19–94 were found to be B unenforceable against the defendant, primarily on the pretext of it not having had notice of the proceedings, then the subsequent default judgment of 52–234–97 would also invariably be unenforceable against it.

At the end of the hearing, I dismissed the appeal in spite of the invocation of s 96(2)(a) by the defendant. When scrutinizing the evidence, C I noticed that there were no factual grounds made available to me to justify the dismissal of the appeal. I had found for a fact that the defendant had lied when it claimed that it was yet to retain the services of solicitors on the day it received Summons No 52–234–97. It had been informed sufficiently, as proved by the letter sent to the defendant per RR55, RR56 and RR58. RR51 and RR53, in crystal clear manner highlighted that even as early as D 5 April 1997, the defendant's solicitor was aware of the matters pertaining to the judgment obtained in Melaka Magistrate's Court Summons No 73–19–94, as he had even requested for the relevant documents. Therefore, come 14 November 1997, when the defendant was litigated against by the plaintiff, the defendant could not deny knowledge. Perusing further, in E particular RR11, the defendant's representative, one Ms Frances Joycelyn Nathan at para 7, admitted that the summons and the statement of claim had been served on it on 14 November 1997. The defendant did not react to that service on the pretext that some administrative reshuffling exercise was being carried out then in its office. And due to that predicament, the defendant was supposed to have failed to retain solicitor's service to act on F its behalf. Yet RR51 and RR53 in crystal clear terms showed that Messrs Gan, Ho and Razlan Hadri had already by then been retained as the defendant's solicitor. The earliest available letter written by Messrs Gan, Ho and Razlan Hadri to Messrs Taye & Co was dated 5 April 1997, months before the service of the summons on 14 November 1997. In spite of all these factors, the defendant still did not make any attempt to set aside the G default judgment of Summons No 73–19–94. In addition to the above, the notation 'noted' in RR32 will confirm that by 17 November 1997 the defendant was fully aware of Summons No 52–234–97. It is no wonder that, with this kind of background and untruths being strewn around by the defendant, the sessions court judge rejected the setting aside application of that default judgment of 52–234–1997 filed by the defendant.

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On the issue of whether the defendant should be entitled to actual notice or not, not surprisingly, the latter came out strongly in support of actual notice. Not unexpectedly the plaintiff submitted otherwise. According to the latter, he had done more than was sufficient to ensure that the defendant had notice of the proceedings of Summons No 73–19–94, I and therefore had fully complied with the requirements of s 96(2)(a) of the Road Transport Act 1987. I will now attempt to set out in detail the steps undertaken by the plaintiff not only as regards the attempts to identify the

relevant insurer but also the subsequent steps pursued to ensure that the recalcitrant insurance company did sit up and assume responsibility. A

RR17 and 18 will show that a search was done by the plaintiff at the Jabatan Pengangkutan Jalan as regards the insurer of JCD 6105. Pursuant to that search, the Jabatan Pengangkutan Jalan, as per GTH 2 (rekod rayuan 40), informed the plaintiff of its inability to furnish the relevant information. It transpired later that at the date of the accident, the insurer of JCD 6105 was definitely the defendant. Surely the defendant's nexus vis-a-vis Zakaria bin Ithnin should and could already be detected at this stage, if everything had been above board. Undeterred and being industrious, in spite of the dearth of information, the plaintiff continued his quest to obtain the relevant information from the Motor Insurers' Bureau of West Malaysia, as per letter dated 13 July 1993. The latter body, vide letter dated 23 August 1993 (RR43), informed the plaintiff that pursuant to its request for information, circulars had been administratively issued to all insurers, in particular the relevant insurer of the material vehicle, to own up. The circular is exhibited in RR72. The contents of RR71 incontrovertibly confirm that the abovementioned Motor Insurers' Bureau had sent a copy of that circular to the defendant. Unfortunately, as the defendant did not respond, the plaintiff again faced a blank wall. This is the crucial stage, which relates to the pertinent question at hand, whether, by virtue of the various acts and steps taken by the plaintiff, it could be construed that the defendant just had had notice of the proceedings, as required by s 96(2)(a) of the relevant Act. Adverting to the facts again, after the failure of the Motor Insurers' Bureau to supply the relevant information, the plaintiff went a step further when it advertised the intentions of the plaintiff to initiate proceedings. This is evinced by GTH1, exhibited in RR38 which confirmed the notification vide the advertisement in the *Star* newspaper. It was after this course of action that the plaintiff proceeded with the litigation against Zakaria bin Ithnin. Without the relevant insurer around, it was plain sailing for the plaintiff, resulting in the learned magistrate pronouncing a default judgment against the said Zakaria bin Ithnin. B C D E F

In spite of that default judgment having been obtained, Zakaria remained nonchalant by not taking any steps to set it aside. Similarly, Talasco, which insured Zakaria, also remained inactive. Even though s 104 of the Road Transport Act 1987 requires the insured to notify the insurer as soon as possible of the occurrence of any event which may give rise to a claim under a policy, I am unable to comment much, as there is no evidence surrounding it. Regardless of that, the rights of the plaintiff are unaffected. It was at this stage that specific information was obtained which identified the defendant as the insurer of vehicle No JCD 6105. With that knowledge in hand, the plaintiff filed an action against the defendant, registered as the abovementioned Summons No 52–234–97. Unfortunately, again the defendant did not appear in open court on 14 November 1997, even though it had been served with the writ and statement of claim a month earlier. Again the plaintiff successfully obtained a default judgment. For clarification, no controversy arose regarding Summons No 52–234–97 with regard to the notice as the defendant in its affidavit had admitted receiving the relevant summons. G H I

A As s 96 of the Road Transport Act 1987 is pertinent to the current problem, for easy reference, I herewith reproduce the relevant portions which read:

> (1) If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgment
B in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the
C judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> (2) No sum shall be payable by an insurer under subsection (1) —
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> (a) in respect of any judgment, unless before or within seven days after
D the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings; ...

Deciphering the above s 96(2)(a), to fall within the ambit of it, these following ingredients among others must be present, namely:

(1) a proceeding did take place;
E (2) a judgment was obtained in that proceedings;
(3) that judgment involved a sum of money;
(4) there is a recipient for that sum of money;
(5) an identified insurer is to pay that sum of money;
F (6) that insurer is to pay —
(a) unless it had no notice of the proceedings before its commencement, in which the judgment was given; or
(b) the insurer had no notice within seven days after the commencement of the proceedings in which the judgment was
G obtained.

Having sifted the evidence, ingredients 1–5 certainly were found to be present.

The answer to ingredient 6 above is inextricably connected to the question of whether the notice should be actual or not. To answer it, it is
H highly pertinent that the words promulgated in the Act be scrutinized carefully, and in its context. By the normal rule of construction, unless there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences (*Maxwell on the Interpretation of Statutes* (12th Ed)). Perusing s 96(2)(a), the phrase used which is relevant for the current
I discussion is '*the insurer had notice of the proceedings*'. As I interpret it, the language is plain and admits only one interpretation ie that the proceedings had come to the notice of the insurer.

It is undeniable that the provision uses the phrase '*had* notice of the proceedings', and not words to the like of 'shall have been served'. In the case of *R v Shurmer* (1886) 17 QBD 323, on the issue of whether written notice was required, when discussing s 7 of 30 & 31 Vict C 35, Lord Coleridge CJ said:

> It may be that a notice given to a person verbally might produce the effect desired to be secured as well as one in writing, but we are bound by the words of the section, and they are not 'given to' but 'served upon'. I think it would be straining these words to make them equivalent to 'given to'.

In the above case, by virtue of the provisions of s 7, it was quite clear that not only must the notice be served but also in writing. In our current case, by analogy, no comprehensive steps or details have been provided for by the law, be it in the format, the manner the notice is to be received in or the identity of the sender. It is unlike the Rules of the High Court 1980, where in special circumstances, the documents must be served personally on a particular person, in a peculiar fashion and within a specific time. Another good example where service of notice is required will be s 431 of the National Land Code 1965, where without prejudice to any other method of service, other ways are exemplified that may be actuated. Section 96(2)(a) merely provides that the insurer 'had notice of the proceedings'. Its brevity astounds. To impose a burden beyond the intention of the law, primarily the indemnification of a party, or in certain circumstances ensure compensation to an aggrieved party would defeat the very purpose of the legislation. After due prognosis of the provision, I am satisfied that so long as the insurer has notice of the proceedings, be it from a third party or otherwise, it will suffice for purposes of the law (*The Law of Motor Insurance* by CN Shawcross (2nd Ed) p 299). In the case of *Lickiss v Milestone Motor Policies at Lloyds* [1966] 2 All ER 972, to afford protection to the insurers, condition 1 of the insurance policy therein read that 'the insured shall give full particulars in writing'. In spite of that strict requirement that notice be given in writing, Lord Denning MR at p 976 bravely watered it down, when he opined that if the insurer had obtained all the material knowledge from another source, then the right of the aggrieved party could still be saved. To appreciate his full remarks, I reproduce the relevant portion found at p 976, which reads:

> Condition 1 was inserted in the policy so as to afford a protection to the insurers so that they should know in good time about the accident and any proceedings consequent on it. If they obtain all the material knowledge from another source so that they are not prejudiced at all by the failure of the insured himself to tell them, then they cannot rely on the condition to defeat the claim.

With the liberal view propagated by Lord Denning MR, in spite of the specific preconditions imposed in the policy, I find it abhorrent to the very spirit of insurance law, and s 96 Act, if a strict and prohibitive interpretation be imposed.

So long as it is sufficiently clear in the mind of the insurer that legal proceedings is impending, such a notice need not necessarily be

documentary in form (*Re Friedlander, ex p Oastler* (1884) 13 QBD 471). No doubt something that is so informal like a casual conversation will not suffice (*Herbert v Railway Passengers Assurance Co* [1938] 1 All ER 650). In as much as by inference that a written notice may probably be the wisest way to give notice to the insurance company of the proceedings, in a case where the defendant had refused to come forward to assume responsibility, then the above scenario applies ie suffice if it had notice through a third party.

For business efficacy, with regard to notice, normally whatever has been agreed upon between parties will be included in the agreement. Oral notice is even sufficient for purposes of insurance policies unless there is express requirement that notice is to be given in writing (*Macgillivray & Parkington on Insurance Law* (6th Ed) p 1788). Apart from the above stance, courts in certain circumstances have assisted in mitigating the harshness of certain requirements in an insurance agreement, eg the requirement of the prescribed time to be given to the insurer (*Re An Arbitration Between Coleman's Depositories Ltd and the Life and Health Assurance Association* [1907] 2 KB 798). Returning to our shores, Peh Swee Chin J in *Looi Meng Leong v PP* [1991] 1 CLJ 355, even had occasion to admit a bit of fresh air into insurance law, when he opined that s 96 of the Road Transport Act 1987 was a catch-all provision against insurers, enacted for the purpose of protecting third parties. How could I not conclude that the combined effect of the above dissertation shows that insurance law in general is not to be viewed in prohibitive light against a third party, but rather with sympathy and liberality? To return to the ingredients which were much earlier dissected, and having taken into consideration all the above factors, ingredient 6 therefore must also be answered in the positive in the final analysis.

As to the issue of the evidential burden, the law is clear in that it lies on the aggrieved party, with the level of proof not exceeding that of a civil case. If the court is convinced on the balance of probabilities that the defendant had notice of the proceedings, then that will suffice. Actual service is merely evidential in its effect. The evidence convinced me that the plaintiff had done more than ample to ensure that the defendant had notice of the proceedings, in spite of the insurmountable obstacles that prevailed. Evidentially, it is overwhelming that the plaintiff had done everything legally and rationally possible. In his quest to comply with the relevant provision, his investigation had led him into areas of the government and the private sectors. The law allows me to presume that the officers of the Jabatan Pengangkutan Jalan had done everything within their powers to elicit the required information, that was sought by the plaintiff. On that score, the court could presume that when that Jabatan had informed the plaintiff of the absence of information pertaining the identity of the insurer of vehicle JCD 6105, it had regularly carried out its official duties (s 114(e) of the Evidence Act 1950). On that premise too, the answer must be correct. Similarly, when the Motor Insurers' Bureau and the *Star* newspaper had fulfilled their functions as requested by the plaintiff, the actions carried out were in accordance with the common course of business (s 114(f) of the Evidence Act 1950).

In the final analysis, any major insurance company in the like of Talasco would not have failed to notice: A

(1) that the information pertaining to it being the insurer of a particular vehicle was not with the Jabatan Pengangkutan Jalan. Surely the Jabatan Pengangkutan Jalan would have acted accordingly to correct the flaw, at the latest when Zakaria bin Ithnin, in this case, attempted B to renew his road tax. Any applicant who desires to renew his road tax must necessarily include his current insurance policy to the application form. It is at this stage that the officers of the Jabatan Pengangkutan Jalan will record the relevant insurer in its books. Therefore, I am unable to fathom how the records of the defendant failed to be registered in the files of this Jabatan. Even a cursory C perusal of ss 58 and 90 of the Act will show that no person shall be allowed to use a vehicle, or permit the usage of a vehicle, unless there was in force the relevant insurance; and

(2) that it was the particular insurer sought out by the Motor Insurers' Bureau, on receipt of a circular, in the like of RR72 and would have D accordingly responded. The role of the Motor Insurers' Bureau in the case of *Lim Yoke Kong v Sivapiran a/l Sabapathy* [1992] 2 MLJ 571, was recognized by Mohd Azmi SCJ, when he commented that this body was more conversant with and knowledgeable about the working of insurance companies. He went a step further when at the end of the hearing, he confirmed the finding of the lower court by concluding E that the refusal to come forward in response to the Motor Insurers' Bureau's circular letter was tantamount to fraud. A factor that needs some discussion is the fact that s 96(2)(a) of the Act speaks of ingredients that relate to matters of pre and post period of the relevant proceedings. In the current case, the information pertaining to the F identity of the insurer came months after judgment had been obtained. In other words, it had gone beyond the proceedings stage. Going by the above case of *Lim Yoke Kong v Sivapiran a/l Sabapathy*, on the supposition that fraud was committed by the defendant, and the counting of the days began on the date the fraud was discovered, then the defendant had already benefited from the fraud. By now it G would be impossible for the plaintiff to comply with the provision totally. The court should not be co-partners or in cahoots with the defendant who has arrived at the scene with unclean hands and unabashedly invoked this provision to successfully defeat the claim of the plaintiff. Without the protection of s 96(2)(a), the defendant is therefore now under a statutory obligation to satisfy the judgment H obtained by the plaintiff on 6 July 1995; and

(3) in as much as Mohd Azmi SCJ by obiter appreciated, and at the same time considered the assistance of the Motor Insurers' Bureau superior to that of substituted service through some newspaper advertisement, it could not be denied that the plaintiff's act was a reflection of his I industry. The defendant cannot hide behind his Lordship's opinion, as earlier in the judgment, he had occasion to qualify it by saying (at p 578):

> In our view that is no excuse for the unconscionable conduct. It is obviously for the insurance company itself to organize its insurance business in such a way as to be able to discharge its statutory and contractual obligations.

In this case, it would take a totally inapt and blind company not to have seen the advertisement in the *Star*, let alone the Motor Insurers' Bureau's circular. To have the records of the Jabatan Pengangkutan Jalan incapable of being updated smells of criminality.

I could sympathize with the defendant, had it merely missed out one of the above instances, but surely not all three. Having considered the totality of the evidence, I came to the irresistible conclusion that the defendant had deliberately ignored any information it received pertaining the proceedings, pursuant to its own agenda. Without mincing my words, by the time the advertisement appeared in the *Star*, the defendant on the balance of probabilities already had notice of the proceedings. Following *Lim Yoke Kong*, the unwillingness to come forward would be construed as fraud.

A rather pertinent point considered by Mohd Azmi SCJ, which I could barely afford to ignore, is this statement made at p 578I which reads:

> We are inclined to think (*without finally deciding on the matter*) that the notice required by s 80(2)(a) *is actual notice and not notice by substituted service,* for such a service by newspaper advertisement would be useless unless the relevant insurance company has been identified by name for the purpose of execution of the judgment obtained against the tortfeasor. (Emphasis added.)

At first blush, my stance could immediately be brushed aside, if not for the fact that a careful study will show that this view was obiter in nature, rather than part of the main decision. In other words, that view was said in passing. *Black's Law Dictionary* (6th Ed) at p 1072 supplies the meaning of 'obiter' and 'obiter dictum' respectively as:

> 'obiter': by the way; in passing; incidentally, collaterally;

'Obiter dictum' reads:

> ... words of an opinion entirely unnecessary for the decision of the case. *Noel v Olds* 78 US App DC 155, 138 F 2d 581 at p 586. A remark made, or opinion expressed, by a judge, in his decision upon a cause, 'by the way,' that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. *Such are not binding as precedent.* See Dicta; Dictum.

Edgar Joseph Jr FCJ in *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1997] 2 MLJ 829 at p 836A defined it as:

> ... obiter dictum is a mere chance remark by the court and is used in contradistinction to ratio decidendi — the rule of law for which a case is authority.

That being so, I have to conclude that as there was no solid foundation upon which the learned judge could depend on, before coming to that conclusion, that chance remark will therefore not be good authority to

resort to to resolve the current problem. To prop up this view, I find support in the case of *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329, where at p 347 Augustine Paul JC (as he then was) said:

> It was said as long ago as 1661 that 'precedents sub silentio and without argument are of no moment' (see *R v Warner* (1661) 1 Keb 66). In this regard *Precedents in English Law* by Cross and Harris (4th Ed) states at pp 158–159:
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> > 'It seems always to have been accepted that if a proposition of law, though implicit in a decision, was never expressly stated either in argument or in the judgment, the decision constitutes no binding authority for it, whether on the ground that there is here an exception to stare decisis, or for the reason that such proposition is not truly part of the ratio. The last 15 years have seen a tendency to regard decisions as not binding at any level of the judicial hierarchy as to propositions expressly affirmed by them if, owing to the absence of any argument on the point, it can be inferred that the deciding court merely assumed their correctness. In this light, decisions without argument must be viewed as a general exception to stare decisis.'
>
> In *Baker v R* [1975] AC 774, the Privy Council held that although inferior courts were bound by decisions of the Board even if they were per incuriam, they were not bound by propositions of law incorporated into the ratio decidendi which had merely been assumed to be correct without argument.

The words which I have italicized in the above paragraph, uttered by Mohd Azmi SCJ in the said case of *Lim Yoke Kong v Sivapiran a/l Sabapathy*, had been enunciated without the benefit of a full argument, and which did not finally decide '... on the matter'. That being so, such a view is without strong foundation. The relevant provision discussed in the above case ie s 80(2) of the Road Traffic Ordinance 1948 is in pari materia with s 96(2)(a) of the Road Transport Act 1987.

In the case of *China Insurance Co Ltd v Ng Siak Yow & Ors* [1963] MLJ 244 where the issue of notice was discussed, Gill J had occasion to opine that what was relevant was that, the insurer must be left with no doubt that the parties intended to take up legal proceedings. Perusing his statement, where the impugned notice came in a form of a letter, it would be a tacit acceptance by him that that notice may be in any form. His Lordship, in support of his decision had alluded to 22 *Halsbury's Laws of England* (3rd Ed) p 376 para 770 which reads:

> The notice must be of sufficient formality to be understood by a reasonable man as an intimation of legal proceedings (*l*), but no particular formality is required (*m*), nor is there any need to plead the giving of notice (*o*).

From this statement, it could be interpreted that so long as the notice was clear enough, and could be understood that legal proceedings were in the offing, then that would be sufficient (*Re Walker, ex p Nickoll* (1884) 13 QBD 469). The fact that there is no necessity to plead the giving of a notice, unlike proceedings in civil litigation, where the demand must be served and pleaded, merely lends further credence to my stance that service need not necessarily be actual.

A In fact, if I may take the extra mileage, apart from the conclusion that the defendant did have notice of the proceedings, I am permitted also to conclude that the defendant either had acquiesced to the outcome of the proceedings or had waived the condition as to notice. I take solace from the authorship of Parkington (6th Ed) of *Macgillivray & Parkington on Insurance Law* at p 741 para 1792, which reads:

B

> The condition as to notice may be waived by the conduct of the company. This may be done before or after there has been a breach of the condition: before, by conduct inducing the claimant to rely on an informal notice or to delay giving formal notice; after, by conduct inducing the claimant to incur further trouble or expense in the prosecution of his claim in the belief that no
> C point would be taken on the defective notice.

Further below at the same page the writer wrote:

> If no notice has been received before the time has expired, mere silence on the part of the insurer cannot operate as a waiver and even an investigation of the claim, without repudiation on the ground that no notice has been given,
> D cannot be a waiver unless the claimant has been put to trouble and expense.

In the current case, by continuing its silence and encouraging the plaintiff to proceed with the litigations, the plaintiff in the process was put to further trouble and expense. Further support may be found in the case of *Webster v General Accident Fire and Life Assurance Corp Ltd* [1953] 1 QB 520, where
E the court upheld the finding of the arbitrator, who had held that the respondents had waived condition 1 of the policy, which required the giving of notice in writing as soon as possible after the occurrence of any loss, with full particulars. The arbitrator had held that the respondents had waived that relevant condition by virtue of their very conduct. By inference, taking a cue from the above case, I may construe the very conduct of the
F defendant, ie its silence, as a waiver of the requirement of a notice to itself; and in the process had accepted any court's judgment. I find no difference between a term in an ordinary contract and a statutory provision where one of the parties waives that term which is beneficial to himself.

Generally, insurance relates to matters that are entered into between an
G insurance company and the insured, and more often than not, a contract of liability will be agreed upon as its foundation. The policy will indicate that the insurers will undertake to indemnify the assured against legal liabilities incurred by him but within a specified range (*Halsbury's Laws of England* (4th Ed) p 350 para 688). The contract will alleviate a financially weak tortfeasor from the burden of having to compensate an aggrieved party, as
H a result of a crippling judgment. Such a contract is the norm nowadays in a society like ours. Even though there is no privity of contract between the third party, ie the aggrieved party and the insurance company in common law, it does not mean that the third party is absolutely without any recourse. Section 95 of the Act in clear terms promulgates that any policy which restricts the scope of third party risks, in certain circumstances, will be
I construed as void and of no effect against the injured third party. Furthermore, under s 97 of the same Act, where a person is insured against liabilities to third parties, and he ends up bankrupt, or the insurance

company gets wound up, the rights of the third party are still protected. This is so as the rights of that insured person now vest in the third party on whom the liability was so incurred.

Alluding to the additional facts obtained in open court and admitted by both parties, I was informed that after judgment was obtained, and as the tortfeasor was unable to pay the adjudged sum, bankruptcy proceedings was taken up by the plaintiff. It was at this stage that information trickled in to establish the material fact that the defendant was Zakaria's insurer. At that earliest of stages, the defendant dutifully sent the cheque to defray the adjudged sum, but subsequently demanded its return. The pretext was that it never received any notice of the earlier proceedings. Certainly it was in poor taste, as in spite of knowing that its client would certainly be adjudged a bankrupt unless indemnified by the defendant, and with the plaintiff left uncompensated, the defendant still attempted to hide behind technicalities. Needless to say the priorities of the defendant did not tally with the universal concept of insurance and the spirit envisaged by Parliament. From the facts of the case, clearly the defendant was not only a party who had come to court with unclean hands, but had come with negative intents. Without mincing words, parties like the defendant who resort to questionable tactics not to pay up claims should not expect any sympathy and assistance from the courts.

On the above grounds, I dismissed the appeal with costs.

Appeal dismissed with costs.

Reported by Mohd Rizal Abidin